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No. 194.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1924.

C. V. BROWNE,
Petitioner,

vs.

THE UNION PACIFIC RAILROAD COMPANY,
Respondent.

## MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF AS AMICUS CURIAE.

LUTHER M. WALTER,
Attorney.

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## MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF AS AMICUS CURIAE.

Now comes Luther M. Walter, of Chicago, Illinois, attorney and counsel for the National Industrial Traffic League, and presents this, his motion for leave to appear and file a brief in the above entitled case as *amicus curiae* and in support of said motion shows:

The National Industrial Traffic League is an organization of some 300,000 shippers of freight by railroad in interstate commerce located throughout the various States of the United States. Paul M. Ripley, of New York, is president; Joseph H. Beek, of Chicago, Illinois, is executive secretary, and Luther M. Walter is attorney and counsel for said organization.

The question involved in the above entitled case is whether the statement by an interstate railroad common carrier of an erroneous date in an order bill or lading constitutes a violation of Section 22 of the Bill

of Lading Act (39 St. L. 415, p. 538) in that it results in a failure of the goods to correspond with the description thereof in the bill of lading at the time of its issuance.

The petitioner, as plaintiff in the *nisi prius* court, brought his action against the Union Pacific Railroad Company to recover damages alleged to have been suffered by reason of his reliance upon the date named in an interstate order bill of lading, which date did not correspond with the actual date of shipment. The Railroad Company answered so as to raise the question of whether the act of its agent in mis-stating the date in the interstate order bill of lading constituted a violation of the Bill of Lading Act, for which it was responsive in damages to the petitioner.

In the trial court the petitioner attacked that part of the answer by motion and by demurrer; the demurrer and motion were overruled by the trial court; petitioner elected to stand thereon, and judgment was rendered against him.

On appeal to the Supreme Court of Kansas the order of the trial court was affirmed and the case comes here on writ of certiorari. In its opinion the Kansas Supreme Court holds definitely that the Bill of Lading Act does not make an interstate railroad common carrier liable to a purchaser for value of such an order bill of lading for damages resulting from his reliance upon an erroneous date appearing therein.

Members of the National Industrial Traffic League are shippers and receivers of grain and other commodities; time is of the essence of grain contracts and of many contracts for the sale and delivery of other commodities. The principal object in the passage of the Bills of Lading Act was to make order bills of lading strictly negotiable. If the decision of the Kansas courts

in this case be sustained, it will adversely affect the rights of a large class of shippers who buy and sell immense quantities of goods upon the faith that bills of lading state the true facts. It is just as important to protect shippers against error and fraud in the date of the bill of lading as in any other part of the bill of lading.

The members of the National Industrial Traffic League are vitally interested in the principle of law involved in this case. On behalf of the membership of the National Industrial Traffic League permission is sought to appear in said case as *amicus curiae* and to present the attached brief and argument.

WHEREFORE, prayer is made that this Honorable Court will enter an order permitting Luther M. Walter to appear as *amicus curiae* in the above entitled proceeding with leave to file the brief and argument attached hereto.

LUTHER M. WALTER.

## BRIEF.

### I.

**A statement in an interstate order bill of lading of the date of shipment goes to the identification of the property covered thereby and is an integral part of the description of the goods.**

**When the agent of a carrier mis-states in an order bill of lading the date of the shipment the carrier is liable for the damages suffered by a purchaser for value of such an order bill of lading resulting from his reliance upon the erroneous date appearing therein.**

Section 22, Bills of Lading Act, (39 Stat. L. 415, p. 538).

*The Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold,* 241 U. S. 371; 60 L. Ed. 1050, reversing *Same* v. *Same,* 93 Kan. 456; 144 Pac. 823.

*Norrington* v. *Wright,* 115 U. S. 188; 29 L. Ed. 366.

*Bowes* v. *Shand,* (House of Lords) 2 App. Cs. 455.

*Filley* v. *Pope,* 115 U. S. 213; 29 L. Ed. 372.

*Cleveland Rolling Mill Co.* v. *Rhodes,* 121 U. S. 255; 30 L. Ed. 920.

## ARGUMENT.

Section 22 of the Bills of Lading Act (39 St. L. 415, p. 538) provides as follows:

> "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employe the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage *in transitu*, or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

It is our contention that the date on an order bill of lading is a part of "the description therein of the goods," and that a carrier is liable to the *bona fide* holder of such bill of lading, who has relied on the date shown in the bill as being the actual date of shipment, for damages caused by failure of the goods offered for delivery to correspond "with the description thereof in the bill at the time of its issue;" and we address our argument solely to that contention.

We shall briefly set forth the state of the law at the time of the passage of the Bills of Lading Act, showing that the courts had held that the date of a shipment was a part of the description of the goods; and shall argue that Congress, knowing the purport of the decisions of this court, used the term "description" to include not only a statement or recital of the character or sort or

kind of goods, but as including the date when the goods were received by the carrier. If we are correct in our contention, the decisions of the courts below were in error and the case should be reversed with directions to overrule the demurrer of the defendant, thus establishing the principle contended for here that the word "description" includes the matter of the date of the bill of lading as well as the other matters above referred to.

In *The Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold,* 93 Kan. 456; 144 Pacific 823, the Supreme Court of the State of Kansas affirmed the judgment of the District Court of Sedgwick County in that State, and held that the purchaser of an order bill of lading for value had a right to rely upon the face of the bill insofar as the date named therein was concerned. That case came to this court on a writ of error and this court reversed the judgment of the Kansas court, holding in *The Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold,* 241 U. S. 371; 60 L. Ed. 1050, that the liability of a railroad common carrier under an order bill of lading for an interstate shipment was a matter to be determined by Congress, and that in the absence of legislation by Congress on the precise point, the rule of the State court holding the carrier liable under the circumstances recited could not be applied. The Carmack Amendment to the Act to Regulate Commerce was, as said by Mr. Chief Justice White in that case: "an assertion of the powers of Congress over the subject of interstate shipments, the duty to issue bills of lading, and the responsibilities thereunder, which, in the nature of things, excluded State action."

The case just cited was decided on June 5, 1916. With full knowledge of the state of the law, as expressed in the decision of this court in that case, Congress enacted the Bills of Lading Act, which was approved on August 29, 1916.

The Bills of Lading Act was passed, as reports of the Committees of Congress at the time clearly show, to avoid conflicting rules in various State courts, and particularly to enact a Federal body of law complete in itself. The injuries to shippers arising from the state of the law at the time was well pointed out in Senate Report No. 149, page 3833, Vol. 53, Part IV of the Congressional Record, and the purpose of the Act was stated to establish, among other things, negotiability of order bills of lading, by giving purchasers of such bills the right to depend upon the statements in the bills of lading.

Long prior to the passage of the Bills of Lading Act the law was well settled in this court that statements in mercantile contracts as to the date of a shipment go to the identification or description of the property, and are, therefore, in the nature of warranties, proof of the truth of which are conditions precedent to recovery for failure to accept the goods.

The case of *Norrington* v. *Wright,* 115 U. S. 188; 29 Law Ed. 366, involved a contract for 5,000 tons of iron rails for shipment from a European port or ports at the rate of 1,000 tons per month, beginning February, 1880, but the whole contract to be shipped before August 1, 1880. While the shipments were made within the final terminal limit of the time allowed, they were not made at the rate of 1,000 tons per month. In holding that the purchaser might properly repudiate the whole contract, Mr. Justice Gray, at page 203 says:

> "In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used

in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. *Behn* v. *Burness,* 3 B. & S. 751; *Bowes* v. *Shand,* 2 App. Cas. 455; *Lowber* v. *Bangs,* 2 Wall. 728; *Davison* v. *Von Lingen,* 113 U. S. 40."

The case of *Bowes* v. *Shand,* (House of Lords) 2 App. Cas. 455, cited by Mr. Justice Gray, is the leading case which holds that statements of the date of shipment go to the identification or description of the property, and it has been followed by several cases in the Supreme Court of the United States and the Federal courts, as well as the Supreme Courts of many of our States. In that case the action was brought by Shand and others against Bowes and others for not accepting a cargo of rice. The declaration stated the contract to be that "the plaintiffs should sell and deliver and defendant should buy and accept from the plaintiffs * * * Madras rice to be shipped at Madras, or coast, for the port of London, during the months of March and/or April, 1874." There was also a second contract for the same number of tons, expressed in the same form of words. The plaintiffs alleged the arrival of the vessel and the refusal to accept the rice.

The defendants in that case put several pleas on the record, the fifth alleging that the contract was made subject to the condition that the rice should be shipped from Madras, or coast, for the port of London during the months of March and/or April, 1874, and at no other time; that it was not so shipped, but at some other and earlier time, and thereby the rice was different in description and character from the rice in the contract mentioned. The twelfth plea, which related to the contract for the second 300 tons of rice, repeated this defense. From the evidence it appeared that out of a total of 8,200 bags, 8,150 were shipped in February and but 50 bags

shipped in March. Bowes & Company, having refused to accept the rice, the shipper sold it at a loss and the action was brought to recover the difference between the contract price and the price obtained at the sale. At page 467, last paragraph, the Lord Chancellor, Lord Cairns, said (italics ours):

> "I must advert to a suggestion which was made at the bar on behalf of the respondents, although it does not appear to have been made in the court below. It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could shew that any particular damage resulted to them from the rice not having been put on board in the months in question. My Lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, *that is part of the description of the subject-matter of what is sold.* What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. The construction may be shewn by evidence to be different from what I have supposed, but if the construction be that which I have supposed, the plaintiff, who sues upon that contract, has not launched his case until he has shewn that *he has tendered that thing which has been contracted for,* and if he is unable to shew that, he cannot claim any damages for the non-fulfillment of the contract."

At page 472 Lord Hatherley concurred "in the result at which my noble and learned friend on the woolsack has arrived with regard to this case * * *," and, at page 475, said:

> "My Lords, the view that I take of the contract, I confess, is this, that it is not the article rice only that is sold, but the thing that is sold is the article rice shipped in March or April, and that the article

rice shipped in February is not the article which has been purchased by the defendants."

And at page 480 Lord Blackburn said (italics ours):

"My Lords, I am entirely of the same opinion.

* * * * *

It was argued, or tried to be argued, on one point, that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject-matter of the contract went, its being shipped at another and a different time (it was said) was only a breach of a stipulation which could be compensated for in damages. But I think that that is quite untenable. I think, to adopt an illustration which was used a long time ago by Lord Abinger, and which always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige a party to take beans. *If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it.* I think in this case what the parties bargained for was rice, shipped at Madras, or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship, and before the defendants can be compelled to take anything in fulfillment of that contract, it must be shewn not merely that it is equally good, *but that it is the same article as they have bargained for*—otherwise they are not bound to take it."

Commenting upon this decision Benjamin in his work on Sales, (1892 Edition), at page 531, Section 588-a, says (italics ours):

> "Mercantile contracts of sale often contain a stipulation that goods are to be shipped within or during a certain time specified in the contract. It is then a condition precedent that the goods shall be so shipped, *the time of shipment forming part of the description of the goods.*"

In *Filley* v. *Pope,* 115 U. S. 213, 29 Law Ed. 372, the petition alleged that on February 20, 1880, the defendant bargained and bought of the plaintiffs, and they sold to him, 500 tons of No. 1 Shott's (Scotch) pig iron at a price of $26 per ton, to be paid in cash by the defendant upon the delivery to him of the iron in bond at New Orleans; the iron to be shipped from Glasgow, Scotland, as soon as possible, and delivery and sale to be subject to ocean risks. The petition further alleged that afterwards, and as soon as possible, the plaintiffs caused the iron to be shipped from Glasgow to New Orleans; that upon its arrival at New Orleans, on May 26, 1880, they offered to deliver it to the defendant in bond at that port, and requested him to receive and pay for it, but he refused to do so, and the plaintiffs were forced to sell it at a loss.

The evidence showed that the works of the Shott Iron Company in Scotland were equi-distant and easily accessible by railway from the ports of Glasgow, on the west coast, and of Leith on the east coast; and such iron was sometimes shipped from Glasgow, and sometimes from Leith; and that by reason of shipper's inability to secure transportation from Glasgow, the iron in question was in fact shipped from Leith. At page 219, Mr. Justice Gray says (italics ours):

> "The contract between these parties belongs to the same class as that sued on in the case, just decided, of *Norrington* v. *Wright, ante,* 188, and likewise falls within the rule that, in a mercantile con-

tract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. The provision in question in that case related to the time; in this, it relates to the place of shipment.

The thing sold, and described in the contract, is '500 tons No. 1 Shott's (Scotch) pig iron,' to be shipped 'from Glasgow as soon as possible.' *It is not merely* 500 *tons of iron of a certain quality; nor is it such iron to be shipped as soon as possible; from any Scotch port or ports; but it is iron of that quality to be shipped from the particular port of Glasgow as soon as possible.* The court has neither the means, nor the right, to determine why the parties in their contract specified 'shipment from Glasgow,' instead of using the more general phrase 'shipment from Scotland,' or merely 'shipment,' without naming any place; but is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination."

And it was held that the defendant, by reason of his failure to complete the contract by delivery of goods described therein, could not recover.

In *Cleveland Rolling Mill* v. *Rhodes,* 121 U. S. 255, 30 Law Ed. 920, an agreement was made between plaintiff and the defendant under which the plaintiff sold to the defendant a certain quantity of iron ore to be shipped during the season of navigation of 1880, or on the opening of navigation in 1880, or as near the opening as possible. From the evidence it appeared that the completed

shipment was not made in accordance with the time specified in the contract. At page 261, Mr. Justice Gray says:

> "When a merchant agrees to sell, and to ship to the rolling mill of the buyer, a certain number of tons of pig iron at a certain time, both the amount of iron and the time of shipment are essential terms of the agreement; the seller does not perform his agreement, by shipping part of that amount at the time appointed and the rest from time to time afterwards; and the buyer is not bound to accept any part of the iron so shipped."

And at page 263 says:

> "The true construction of the contract being that that amount of iron shall be ready to be shipped and be actually shipped as soon as navigation permits, 'that is part of the description of the subject-matter of what is sold'; and the 'plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered the thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfillment of the contract.' Lord Cairns in *Bowes* v. *Shand*, 2 App. Cas. 455, 468; *Norrington* v. *Wright*, 115 U. S. 188, 209."

We submit that the cases above cited fully support our contention. We think the decision of the court below should be reversed: (a) because Congress enacted the Bills of Lading Act just after this court, on account of the absence of Federal legislation, had refused to hold a carrier liable to a *bona fide* holder of an interstate order bill of lading for damages caused by his reliance on the date therein stated, and also (b) because it has been uniformly held in this court that the date of shipment goes to the identification or description of the property just as much as does a statement of the nature or species of the goods.

Respectfully submitted,

LUTHER M. WALTER,
*Amicus Curiae.*